

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: February 15, 2002

In the Matters of:

ROBERTO'S TACO SHOP,

Employer,

on behalf of

MANUEL GONZALEZ-RODRIGUEZ,

Alien.

and

ROBERTO'S TACO SHOP,

Employer,

on behalf of

MARTIN GONZALEZ-RODRIGUEZ,

Alien.

BALCA Case No.: 2001-INA-142

ETA Case No.: 1998-NV-09390223/ML

BALCA Case No.: 2001-INA-150

ETA Case No.: 1998-NV-09390227/ML

Appearance: Susan M. Jeannette
Agent for Employer and Alien

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Roberto's Taco Shop (Employer) filed applications for labor certification¹ on behalf of Manuel Gonzalez-Rodriguez (GAF 19), and on behalf of Martin Gonzalez-Rodriguez

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

(Aliens) on August 14, 1997. (RAF 20).² Employer seeks to employ Aliens as Cooks. This decision is based on the records upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

In both applications, Employer listed as a job requirement two years of experience in the job offered. (GAF 19, RAF 20). In both cases, the Certifying Officer issued a Notice of Findings concluding that Employer's two year experience requirement was an unduly restrictive job requirement in violation of 20 C.F.R. § 656.21(b)(2) for the position of Fast-food or Specialty Cook, DOT Code 313-361-014, which has a Specific Vocational Preparation of only six to twelve months.³ (GAF 14-16; RAF 15-17)

Employer filed an identical rebuttal for both applications. First, Employer argued that it is seeking to fill the position listed in the DOT as Cook, Specialty, Foreign Food, DOT Code 313.361-030, which has an SVP that would permit the two year experience requirement. (GAF 6-10; RAF 7-11) Employer argued that the position requires the cook to adhere to a myriad of Mexican specialty recipes in seasoning, sauce, vegetable and meat preparation prior to cooking and during the final preparation/cooking. Employer gave the example of carne asada, "which must be seasoned, marinated and cooked in accordance with proprietary recipe concerning ingredients, method and time related elements." Employer stated that same was true as to its specialty carnitas and chimichangas.

Second, Employer argued that business necessity compelled the two year experience requirement. In this regard, Employer cited his own experience as a Mexican restaurant owner, the complexity of the proprietary recipes utilized, and the requisite time and skill needed for proper preparation of the menu items. Employer provided the example of the need to soak beans in water for about 12 hours, and then cook them slowly for about two hours. Employer also gave the example of hand preparation of tortillas – the size of which is dependent on their end use – and the need to specially prepare the sauce for enchiladas. Additionally, Employer cited the presence of chorizo on the menu, which requires the grinding of pork combined with recipe specific seasonings. Employer stated that virtually all items on its menu are prepared from scratch and require cooking skill and experience. In a declaration, Employer noted that all cooks it had hired since 1994 had a minimum of two years of experience in the offered position.

On June 13, 2001, the CO issued Final Determinations denying certification in both cases.

² In this decision, GAF is an abbreviation for Manuel Gonzalez-Rodriguez Appeal File, and RAF is an abbreviation for Martin Gonzalez-Rodriguez Appeal File.

³ The SVP is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

(GAF 5-6, RAF 4-5) First, the CO observed that there were no chimichangas on Employer's menu. Second, the CO observed that Employer is a chain restaurant with a standardized menu. Finally, the CO stated that the job lacks several duties common to Foreign-food specialty cooks – specifically "plans menus ... serves food to waiters on order."

On July 11, 2001, Employer requested reconsideration by the CO and, alternatively, review by this Board in both cases. (GAF 1; RAF 1A). The agent for Employer argued that "tortas," which are on the menu, could be characterized as "chimichangas." Moreover, the agent argued that Employer's menu includes a myriad of items that require substantially more skill to prepare and cook, citing the example of Chicharron. The agent submitted in support of this argument non-proprietary recipes for a version of Chicharron and Chimichangas. The CO denied reconsideration in both cases on July 27, 2001. (GAF 4; RAF 1).

DISCUSSION

As the full Board recently held in *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*), "[t]he DOT is merely a guideline and should be considered in context rather than simply applied mechanically. *Promex Corporation*, 1989-INA-331 (Sept. 12, 1990); *Mr. & Mrs. Mohammad Rezk*, 1989-INA-333 (Sept. 12, 1990)." We concur with the panel in *Farm Café*, 1999-INA-80 (Aug. 25, 1997), which observed that that "[t]he DOT states a variety of food preparation positions. Chefs and cooks working in the more expensive establishments require greater training and experience, while fast food specialty cooks require less training and experience, according to the DOT guidelines." *Farm Café*, and a long line of similar decisions have well established that cooks working in restaurants serving standard American or American/Ethnic/Foreign foods, even if somewhat more than a "fast food" restaurant, are not necessarily entitled to classification under the DOT as a specialty cook or hotel/restaurant cook. See, e.g., *Farm Café, supra*; *Marcelo's Pizza*, 1997-INA-155 (Mar. 19, 1998); *Armand's Chicago Pizza*, 1998-INA-166 (Jan. 28, 1999); *Pasquale's Pizza & Restaurant*, 1999-INA-23 (Mar. 9, 1999); *Ciambone, Inc.*, 1999-INA-1 (July 22, 1999); *A & S Pizza & Pasta, Inc.*, 1999-INA-12 (July 22, 1999); *La Pizzeria Restaurant*, 1999-INA-4 (July 29, 1999); *George's Pasta & Pizza Restaurant*, 1999-INA-44 (July 29, 1999); *Potomac Pizza*, 2000-INA-83 (May 15, 2000); *C & C Pizza*, 1999-INA-254 (Mar. 22, 2000); *Gourmet Pizza Deli*, 2000-INA-79 (Nov. 16, 2000). Where a restaurant serves such standard fare, it is generally required that an employer establish business necessity for experience requirements exceeding SVP 5. The cases *sub judice* fit the rulings of those decisions.

Employer's menu clearly shows that it is a chain restaurant offering inexpensive standard Mexican and Mexican/American fare. Thus, we find that the CO properly raised the issue of whether the two year experience requirement might be unduly restrictive.

Employer's rebuttal dwells on the assertion that its recipes are proprietary, and that much of its food requires skill in preparation. However, proprietary recipes do not necessarily mean

difficult recipes.⁴ Moreover, while the examples Employer gave of soaking and cooking beans and hand preparing tortillas, grinding meat for chorizo, and making enchilada sauce, suggest that some skill is needed to cook in Employer's restaurant, they fall far short of establishing that it takes two years of experience to gain the ability to cook such items.

In sum, Employer's rebuttal establishes neither that the job was mis-classified by the CO, nor that business necessity requires the two year experience requirement for Employer's cook positions.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of
the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

⁴ Because of the way the Appeal Files were assembled in these matters, it is difficult to determine whether the recipes for Chicharron con Heuvos and ingredient descriptions for Chimichangas were part of the record prior to issuance of the Final Determination or were part of the Agent's submission on the motion for reconsideration. Assuming that they are part of the record properly considered by the the Board , however, they only illustrate relatively straightforward cooking requirements.

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.